

**BEFORE THE  
DEPARTMENT OF NATURAL RESOURCES**

**NOTICE OF PUBLIC HEARING**

Natural Resources Board Order AM-21-12

**NOTICE IS HEREBY GIVEN** That pursuant to ss. 227.16, 227.17, and 285.11, Wis. Stats, the Department of Natural Resources, hereinafter the Department, will hold a public hearing to consider the proposed changes to chs. NR 400, 405, 408, and 410 related to consistency with federal major source permit review requirements and clean-up of rules related to the former indirect source program on the date and at the time and location listed below.

**NOTICE IF FURTHER GIVEN** that the proposed revisions relate to issues for State Implementation Plan approvability, and the State Implementation Plan developed under s. 285.11(6), Stats. will be revised. The Department will also be accepting comment at this hearing on the submittal to the U.S. Environmental Protection Agency of final rules promulgated under this rulemaking as part of a revision to Wisconsin's State Implementation Plan.

**Hearing Information**

***Date and Time***

Tuesday, November 5, 2013, 1:00 to 2:00 PM

***Location***

Natural Resources Building, Room 713, 101 S. Webster St., Madison

Reasonable accommodations, including the provision of informational material in an alternative format, will be provided for qualified individuals with disabilities upon request. Contact Robert Eckdale in writing at the Department of Natural Resources, Bureau of Air Management (AM/7), 101 S. Webster St., Madison, WI 53703; by email to [Robert.Eckdale@wisconsin.gov](mailto:Robert.Eckdale@wisconsin.gov) ; or by calling (608) 266-2856. A request must include specific information and be received at least 10 days before the date of the scheduled hearing.

**Availability of the Proposed Rules and the Fiscal Estimate and Economic Impact Analysis**

The proposed rule and supporting documents, including the fiscal estimate and economic impact analysis, may be viewed and downloaded from the Administrative Rules System Website at <https://health.wisconsin.gov/admrules/public/Rmo?nRmold=13843>. If you do not have internet access, a printed copy of the proposed rule and supporting documents, including the fiscal estimate and economic impact analysis, may be obtained free of charge by contacting Robert Eckdale, Department of Natural Resources, Bureau of Air Management (AM/7), 101 S. Webster St., Madison, WI, 53703, or by calling (608) 266-2856.

**Submitting Comments**

Comments on the proposed rule must be received on or before November 8, 2013. Written comments may be submitted by U.S. mail, fax, email, or through the internet and will have the same weight and effect as oral statements presented at the public hearing. Written comments and any questions on the proposed rules should be submitted to:

Gail Good  
Department of Natural Resources  
Bureau of Air Management (AM/7)  
101 S Webster St, Madison, WI 53703

Phone: (608) 266-1058

Fax: (608) 267-0560

E-mail: [gail.good@wisconsin.gov](mailto:gail.good@wisconsin.gov)

Internet: Use the page for this rulemaking on Administrative Rules System Website (requires registration to comment) at <https://health.wisconsin.gov/admrules/public/Rmo?nRmold=13843>

**Analysis Prepared by the Department of Natural Resources**

**Statute interpreted:** Section 285.11 (1) and (6), Stats. The State Implementation Plan developed under s. 285.11 (6), Stats., is revised.

**Statutory authority:** Sections 227.11 (2) (a), 285.11 (1), (16) and (17), and 285.60 (11) (b)

**Explanation of agency authority:** Section 227.11 (2) (a), Stats., gives state agencies general rule-making authority. Section 285.11 (1), Stats., gives the Department the authority to promulgate rules implementing and consistent with, ch. 285, Stats. Section 285.11 (6), Stats., requires the Department to develop a plan for the prevention, abatement, and control of air pollution. The plan must conform with the Clean Air Act and is necessary for new source review implementation. Section 285.11 (16) requires the Department to promulgate rules that may limit the classification of a major source to specified air contaminants. Section 285.11 (17) requires the Department to promulgate rules, consistent with the federal Clean Air Act, that modify the term ‘modification’ as it relates to specific categories of stationary sources. Section 285.60 (11) (b), Stats., establishes that the Department may not require a permit for an indirect source under ch. 285, Stats

**Related statute or rule:** There are no related statutes that are not identified above.

**Plain language analysis:** The objective of this rule package is to revise language in chs. NR 400, 405 and 408 to maintain consistency with federal requirements and definitions. Additionally, sections of chs. NR 400 and 410 need to be repealed due to the repeal of ch. NR 411.

In May 2006, the Department requested approval by the U.S. Environmental Protection Agency (USEPA) of rules promulgated by Wisconsin to incorporate federal New Source Review Reform requirements as a revision to the State Implementation Plan (SIP). The USEPA approved the SIP revisions, but subsequently requested changes to language in chs. NR 405 and 408. The changes pertain to the fuel use prohibition that is part of the definition of “major modification”.

Section NR 405.02 (25i) defines “Regulated NSR air contaminant” and specifically identifies volatile organic compounds as a precursor for ozone. USEPA has requested inclusion of nitrogen oxides (NO<sub>x</sub>) in the definition for clarification purposes. Similarly USEPA requires, through its 2008 New Source Review Rule, explicit identification of NO<sub>x</sub> and sulfur dioxide (SO<sub>2</sub>) as precursors to particulate matter with a diameter of 2.5 micrometers or less (PM<sub>2.5</sub>) within the definition of “Regulated NSR air contaminant”. the Department has also amended the definition of “Regulated NSR air contaminant” in s. NR 408.02 (29m) to specifically address precursor pollutants in nonattainment areas. Additionally, the Department will amend the definitions of PM<sub>2.5</sub> and particulate matter with a diameter of 10 micrometers or less (PM<sub>10</sub>) to address a USEPA-identified SIP deficiency. The definitions as currently written do not specifically mention condensables as required in the federal 2008 New Source Review Rule.

On April 27, 2011, the Joint Committee for Review of Administrative Rules (JCRAR) adopted a motion under s. 227.26 (2) (d), Wis. Stats., suspending ch. NR 411. Subsequent passage of legislation introduced by JCRAR in support of the suspension (see [2011 Wisconsin Act 121](#)), resulted in the repeal of ch. NR 411. The primary purpose of ch. NR 411 had been to control carbon monoxide emissions from indirect sources through conditions established in construction and operation permits. Therefore the Department proposes to repeal rules whose only purpose is in support of ch. NR 411. Rules proposed for repeal include ss. NR 400.02 (101) and (106), and 410.03 (3). Section NR 400.02 (101) and (106) define ‘modified indirect source’ and ‘new indirect source’ respectively. Section NR 410.03 (3) establishes fees for the application and issuance of permits to construct or modify an indirect source.

**Summary of, and comparison with, existing or proposed federal statutes and regulations:** In a letter dated June 17, 2009, the USEPA notified the Department that the definition of the term “major modification” in s. NR 405.02 was inadequate because it failed to identify permits issued under federal authority. Wisconsin’s Prevention of Significant Deterioration (PSD) program was approved into its SIP on June 28, 1999. Before that, PSD construction permits were issued under federal authority. When s. NR

405.02 (21) (b) (5) was written, the references to federal authority were inadvertently omitted. Because the federal citations were omitted from the rule, USEPA identified that in a very limited situation, the current state definition would allow a source to make a change to use a different fuel or raw material without undergoing major new source permit review for the change, even though the change could be prohibited under a federal permit. The Department will amend this definition to ensure that it is consistent with USEPA rule and policy and recognizes all federally-issued permits. The Department is likewise amending the definition of “major modification” at s. NR 408.02 (20) for nonattainment area new source review.

The alternative to this rule action is to keep the rules as they are, which USEPA has already identified as an inconsistency with federal rules. However, in a Federal Register filed June 15, 2012, USEPA disapproved narrow portions of the SIP pertaining to permit requirements in chs. NR 405 and 408 that would be addressed with this rulemaking. In the Federal Register, USEPA stated that they are under obligation to promulgate a Federal Implementation Plan (FIP) addressing the disapproved portions of the SIP within 2 years. The Federal Register states that the FIP will not be promulgated if Department rectifies the deficiencies within the 2 year timeframe.

The clarifications of NO<sub>x</sub> as a precursor to ozone and NO<sub>x</sub> and SO<sub>2</sub> as precursors to PM<sub>2.5</sub>, as well as the clarification of accounting for PM<sub>2.5</sub> and PM<sub>10</sub> condensables as a portion of PM<sub>2.5</sub> and PM<sub>10</sub> emissions are not policy changes nor do they change how Department currently implements chs. NR 405 and 408 requirements. On June 15, 2012, USEPA disapproved a narrow portion of Wisconsin’s SIP for the 1997 ozone National Ambient Air Quality Standard pertaining to air construction permitting. This was done because NO<sub>x</sub> was not explicitly identified as a precursor to ozone as part of PSD permit program requirements. The final disapproval triggered a requirement that USEPA promulgate a FIP addressing the deficiency no later than 2 years from the date of disapproval. USEPA published a proposed disapproval of Wisconsin’s submittal on December 18, 2012, because the submittal did not meet the 2008 PM<sub>2.5</sub> SIP requirements. Specifically, the revisions submitted did not explicitly define the precursors of PM<sub>2.5</sub>, nor did they contain the prescribed language to ensure that gases that condense to form particulate matter (PM), known as condensables are regulated as part of PM<sub>2.5</sub> and PM of less than 10 micrometer (PM<sub>10</sub>) emissions. Final disapproval to portions of the SIP relating to identifying precursors of PM<sub>2.5</sub> will also result in the promulgation of a FIP unless the deficiencies are addressed.

Not repealing sections of chs. NR 400 and 410 in response to the repeal of ch. NR 411 by the legislature would potentially create confusion and perpetuate an inconsistency with Department rules.

#### **Comparison with similar rules in adjacent states (Illinois, Iowa, Michigan and Minnesota):**

Illinois and Minnesota are delegated states, so they are directly implementing the federal program and not implementing their programs through a State Implementation Plan (SIP), as Wisconsin does. Iowa and Michigan, similar to Wisconsin, are SIP approved states, so they are also implementing a federal program, but through their own state rules and regulations. It is the goal of SIP-approved states to implement federal programs in accordance with the regulations set out in federal code. The majority of this rule package addresses changes necessary to comply with federal regulations. Those changes not dictated by federal regulations are associated with the repeal of fees related to the indirect source program which no longer exists in Wisconsin, thereby addressing a current internal inconsistency.

#### **Summary of factual data and analytical methodologies used and how any related findings support the regulatory approach chosen:**

The Department did not use any factual data or analytical methodologies in developing the proposed rules. The changes proposed in this rule package are based on deficiencies in the rules identified by the USEPA and a comparison of the current state rules to the federal rules.

**Analysis and supporting documents used to determine the effect on small business or in preparation of an economic impact analysis:** The proposed changes to the new source permit review programs only affect major sources which typically do not include small businesses. The proposed

changes related to the former indirect source permit program will not have any effect on small businesses since the indirect permit program has been repealed and the proposed changes are of a clean-up nature only. The Department did not use existing documentation in determining the effect on small business or in preparation of the economic impact analysis.

**Effect on small business (initial regulatory flexibility analysis):** The Department does not believe that the proposed rule revisions will have an economic impact on small businesses.

The Small Business Regulatory Coordinator may be contacted at [SmallBusiness@dnr.state.wi.us](mailto:SmallBusiness@dnr.state.wi.us), or by calling (608) 266-1959.

**Agency contact person:** Gail Good; P.O. Box 7921, Madison, WI 53707-7921; Telephone number (608) 266-1058; email address: [gail.good13@wisconsin.gov](mailto:gail.good13@wisconsin.gov)

### **Environmental Analysis**

The Department has made a preliminary determination that adoption of the proposed rules would not involve significant adverse environmental effects and would not need an environmental analysis under ch. NR 150, Wis. Adm. Code. However, based on comments received, an environmental analysis may be prepared before proceeding. This analysis would summarize the Department's consideration of the impacts of the proposal and any reasonable alternatives.

### **Fiscal Estimate and Economic Impact Analysis Summary**

The Department believes the proposed rules will have no fiscal effect. The changes being proposed either amend rules to match current practice and maintain consistency with federal requirements and definitions, or eliminate definitions and fees for a program no longer used in Wisconsin.

The Department solicited information and advice on the economic impacts of the proposed rules from those who potentially could be affected or who might likely be interested. Most responders to the solicitation indicated that they had no input because they believe the proposed rules will have no economic impact on them. One responder felt there was economic benefit from the proposed rules and asked the Department to quantify that benefit. Additionally, the commenter felt that the proposed rules addressed broader policy issues whose economic benefits should be analyzed. The Department does not believe the proposed rules provide economic benefit. The economic benefit from the repeal of ch. NR 411 occurred when the chapter was repealed through legislative action and is not due to the clean-up of related rules proposed. Testimony, including an estimate of the costs associated with the indirect source permit program, was given at the time of the legislative action. The portions of the rule package associated with the major new source review program found in chs. NR 405 and 408 are amendments to ensure that the rules align with current Department practice as well as USEPA policy and do not represent changes in implementation. The economic impact analysis speaks to the economic impacts of the proposed rules, not the underlying statutes that give the Department authority for rulemaking. There were no revisions to the Economic Impact Analysis.

Dated at Madison, Wisconsin: September 27, 2013

STATE OF WISCONSIN  
DEPARTMENT OF NATURAL RESOURCES

By \_\_\_\_\_  
Cathy Stepp, Secretary